IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4201 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KOTADIYA MANOJKUMAR BACHUBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 4201 of 1987

MR BP MUNSHI for Petitioner No. 1

MR JITENDRA M PATEL for Petitioner No. 1

MR DP JOSHI, LD. AGP for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 18/01/2003

ORAL JUDGEMENT

1. Kotadiya Manojkumar Bachubhai, petitioner has filed this petition with a prayer that this Court may issue a writ of mandamus or a writ in the nature of mandamus, directing respondent No.1 State of Gujarat and

Executive Engineer, Bhadar Adhunikaran Div.2, Dhoraji, respondent No.2 to regularise and absorb the petitioner on permanent basis as a clerk or clerk-cum-typist and further direct the respondents to treat the petitioner having continued in service right from the year 1981 and further direct them to give him continuous service from the year 1981.

2. The facts giving rise to this petition are as under:-

2.1 The petitioner was initially appointed as a work charge clerk from 23.4.1981 to 21.5.1981 for 29 days in Bhadar Adhunikaran Division at Dhoraji. The petitioner in this petition has stated that he was appointed from time to time for 29 days right from 23.4.1981. The break-up of the service period has been produced at Annexure `A', the details thereof as under:

Period	Days
1. 23.4.1981 to 17.11.1981	145
2. 1.12.1982 to 15.1.1983	197
3. 5.2.1983 to 15.12.1983	263
4. 16.12.1983 to 4.1.1985	261
5. 7.1.1985 to 18.1.1986	290
6. 22.1.1986 to 17.11.1986	203
7. 8.1.1987 to 21.4.1987	87

2.2 The petitioner has also stated that he was appointed as work charge clerk from time to time on the above basis. It has been further alleged by the petitioner that he has also performed duty for a period of about 1 1/2 months but the respondents are not giving any order of appointment to him and are also not paying him salary for the said period. It has been contended in the petition that, as petitioner has worked more than 240 days in a year, and therefore, he is entitled to continuity in service. It was further contended that action of the respondents in not giving employment is discriminated and therefore their actions are violative of the fundamental rights guaranteed under Articles 14

and 16 of the Constitution of India. The petitioner has annexed necessary certificates in this behalf. The petition has been filed on 25th August, 1987.

2.3 Originally, this Court has issued notice on 27th August, 1987. In response to the notice, one Shri J.S.Thakkar, Executive Engineer has filed affidavit somewhere in October 1987. In the said affidavit, it was contended that the petitioner was appointed as a clerk on purely temporary basis. His appointment was also not from the Employment Exchange. It was further submitted that no advertisement was given for inviting applications from other persons when the petitioner was given temporary appointment. It was further submitted that if such a person who had worked for some time on temporary basis is given regular appointment by the respondents, then the respondents would be acting in an improper manner because in that case other persons would not get any chance to compete with the petitioner for getting job of a clerk.

2.4 It was further submitted that petitioner was not engaged to work as clerk on temporary basis after 21st April, 1987, as there was no additional work and therefore the petitioner cannot be appointed for regular appointment.

3. When the matter was placed for admission hearing on 9.12.1988, this Court (Coram: M.B.Shah, J. (as he was then) pleased to pass the following order:

> "Rule. By way of interim direction, it is ordered that the petitioner's case for being appointed on regular basis or on temporary basis shall be considered by the Department on the basis of the existing Circulars."

4. During the pendency of the petition, the petitioner has also filed rejoinder. In the rejoinder, he has specifically stated that, pursuant to the interim order of this Court, he has made a representation on 6.11.98 and 4.12.98. However, the Executive Engineer replied by his letter dated 7.1.99 that petitioner has filed Special Civil Application which is at the final hearing stage, and as the petitioner has already filed application, the Secretary as well as the Executive Engineer - the department is not required to do anything.

5. The petitioner, therefore, contended before this Court that, inspite of the interim order of this Court and inspite of making representation by the petitioner

dated 6.11.98 and 4.12.98 the department has passed an order on 7.1.99 mechanically without considering true spirit and object of the interim order passed by this Court.

6. In the rejoinder the petitioner has pointed out the reasons given by the respondents of not continuing the regular employment of the petitioner as (i) irregular appointment, (ii) entry without Employment Exchange, (iii) economic measures; and (iv) paucity of work.

7. As regards paucity of work, the petitioner submitted that right from 1987 till today the Government has employed several persons both on regular basis as well as on temporary basis and, therefore, the contention of the Government that there is no work at all or the petitioner was appointed on additional work and therefore such defence of the respondent is self-contradictory and unfounded. The petitioner further submitted that all those employees who were employed are given regular emoluments and wages both to the permanent employees as well as temporary employees and therefore the economic measures suggested by the respondents in their affidavit is also not correctly borne out from the record of the case.

8. As regards other contention about appointment is not made through employment exchange, the petitioner submitted that he was called for interview and after he was interviewed by the responsible officers of the department he was selected and appointed to the said post. The respondents have not clarified how and under what circumstances the appointments were being made against the policy of the Government.

9. Mr.Munshi, learned advocate for the petitioner has stated, in any view of the matter, this Court may direct the respondent authority not to take any objection regarding age bar and may consider the regularisation of the petitioner because the petitioner is an experienced person and he has worked in the department right from 1981 and if he is not employed in the department then he will not be able to secure job at any other place because of age bar.

9.1 Learned advocate for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in the case of Jacob M.Puthuparambil and others vs. Kerala Water Authority and Others reported in (1991) 1 SCC 28. In that case the Hon'ble Supreme Court considered the preamble Part.III and Part.IV of the Constitution of

India and on page 47 para 17 direction no.2 has been granted by the Apex Court after considering all facts of the case which reads as under:

> "(2) the services of workers employed by the Authority between April 1, 1984 and August 4, 1986 will be regularised with immediate effect if they possess the requisite qualifications for the post prescribed on the date of appointment of the concerned worker."

9.2 Similarly, he has also relied upon the judgment in the case of Daily Rated Casual Labour Employed under P & T Deptt. Through Bhartiya Dak Tar Mazdoor Manch reported in 1987(55) FLR 842 where the Hon'ble Supreme Court has also directed the Union of India to absorb the casual labourers who have worked for more than one year continuously.

9.3 He has also relied upon the judgment of the Hon'ble Supreme Court in the case of of Dhirendra Chamoli and Another vs. State of U.P. reported in (1986) 1 SCC 637. On page 638 the Hon'ble Supreme Court has observed as under:

> ".... It must be remembered that in this country where there is so much unemployment, the choice for the majority of people is to starve or to take employment on whatever exploitative terms are offered by the employer. The fact that these employees accepted employment with full knowledge that they will be paid only daily wages and they will not get the same salary and conditions of service as other Class IV employees, cannot provide an escape to the Central Government to avid the mandate of equality enshrined in Article 14 of the Constitution."

9.3(A) In para 3 on page 639 the Hon'ble Supreme Court has observed as under:

> "But we hope and trust that posts will be sanctioned by the Central Government in the different Nehru Yuvak Kendras, so that these persons can be regularised. It is not at all desirable that any management and particularly the Central Government should continue to employ persons on casual basis in organisations which have been in existence for over 12 years."

9.4 Similarly, learned advocate for the petitioner

has also relied upon another judgment of the Hon'ble Supreme Court in the case of U.P.Income Tax Dept. Contingent Paid Staff Welfare Association vs. Union of India and others reported in 1988(56) FLR 121.

9.5 He has also relied upon the judgment of this Court in the case of Ghanshyam M.Pandya Vs. State of Gujarat & Others reported in 1985 G.L.H. (U.J.) 51 delivered by R.C.Mankad, J and also another judgment of this Court in the case of Dineshkumar Himatlal Nimavat Vs. State of Gujarat and another reported in 1987(2) G.L.H. 135.

9.6 Finally he has relied upon the Division Bench judgment of this Court (Coram: D.M.Dharmadhikari C.J. (as he was then) and P.B.Majmudar, J.) decided somewhere in May 2001 in Letters Patent Appeal No.357 of 2000 in Special Civil Application No.4622 of 1986 in the case of R.A.RAJGURU Vs. STATE OF GUJARAT. In that case also identical situation was that some of the temporary workers were working as junior clerks and their prayers are that they had put in 13 years of service as junior clerks on daily wage basis, they have a legitimate claim to be considered for regularisation or absorption in the services of the Board. In that case the Division Bench considered the judgment of the Apex Court in the case of Agricultural University vs. Rathod Labhu Bechar reported in AIR 2001 SC 706. After considering this judgment the Division Bench has given following directions:

"(i) The State of Gujarat through Secretary, Education Department (respondent No.1) on being approached by the Gujarat Secondary Education Board (respondent No.2), shall consider creation of 40 or more supernumerary posts of junior clerks with designation, nomenclature and pay-scale as considered suitable for such posts. For this purpose, a formal approach in writing shall be made by the Board to the State Government within a period of one month;

(ii) On creation of supernumerary posts of junior clerks, the respondent Board shall prepare a scheme of regularisation or absorption of the appellants by process of scrutiny or selection based on efficiency and past performance of the appellants;

(iv) Let the process of creation of posts, framing a scheme for absorption or regularisation of service of the appellants on newly created

posts and respondents Nos.3 to 37 on the sanctioned posts be completed by respondents Nos. 1 and 2 within an outer limit of three months from today. Until then, the appellants and respondents Nos.3 to 37 shall be continued in service of the respondent Board on the same terms and conditions existing on the date of making of this order."

10. Mr.D.P.Joshi, learned AGP for the respondents has relied upon the judgment of the Apex Court in the case of State of Haryana and others vs. Piara Singh and others reported in AIR 1992 SC 2130.

11. I have gone through the facts of that case. In that case i.e. case of Piara Singh (supra) the employee had only worked for one year. The Apex Court has set aside the order of the High Court in this behalf. In para 10 the Hon'ble Supreme Court has observed as under:

"....The court comes into the picture only to ensure observance of fundamental rights, statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the directive principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. Where a temporary or ad hoc appointment is continued for long the court presumes that there is need and warrant for a regular post and accordingly directs regularisation."

12. I have considered the facts of the case particularly from the year 1981 to 1987 the workman has worked for 29 days in a month from time to time. I have also considered the interim order passed by this Court dated 9.12.1988 which I have reproduced in para 3 of the judgment and also the affidavit-in-reply in which the

Government has given reasons not to continue the petitioner in this behalf and also rejoinder filed by petitioner. I have also considered the judgments of the Apex Court in the case of Jacob M.Puthuparambil and others (supra), Daily Rated Casual Labour Employed under P&T Dept.(supra), Dhirendra Chamoli and another (supra) and also in the case of U.P.Income Tax Dept. Contingent Paid Staff Welfare Association (supra) and also Division Bench judgment of this Court in the case of Ghanshyam M.Pandya (supra). I have also considered the submission of Mr.Munshi that this Court may direct the Government that Government should regularise the case of the petitioner and issue a writ of mandamus directing the Government to treat the petitioner in continue of service right from the year 1987.

12.A On the other hand, Mr.Joshi has stated that it is an admitted fact that right from the year 1987 till today the petitioner has not worked and if this Court direct the Government to treat this petitioner as continue in service right from the year 1987 then it will be unnecessary burden to the public exchequer of salary of this petitioner by the Government.

12.B I have considered the rival submissions and also judgments of the Apex Court. With a view to see that justice is rendered to the petitioner and there may not be unnecessary burden to the Government, I am of the view that if following directions are issued by this Court in the case of the petitioner particularly in light of the judgments of the Hon'ble Supreme Court which I have referred the same will meet the ends of justice both to the petitioner as well as the Government.

(i) The respondents particularly Secretary along with Executive Engineer, P.W.D. Department - respondent No.2 will consider the order of this Court dated 9.12.88 and representation made by petitioner on 6.11.98 and 4.12.98 and judgment of this Court and if petitioner desire to make any further representation then he will also allow to make further representation and all these representations be considered by respondent No.1 and 2 personally. If petitioner desire that he should be personally heard then respondents No.1 and 2 shall also give an opportunity to the petitioner for personal hearing.

(ii) The respondents no.1 and 2 will consider the petition filed by the petitioner, rejoinder filed by the petitioner, order of this Court

dated 9.12.88, representation made by petitioner on 6.12.98 and 4.12.98 and any further material including the judgment of this Court which was placed before them and adjudicate the claim of the petitioner regarding regularise the service in light of the decision of the Supreme Court. However, they will not adhere the order dated 7.1.99 which has been passed without application of mind.

(iii) The respondents will also consider the case of the petitioner as to whether the petitioner is fulfilling the basic qualification of the post and whether the petitioner has enough experience or not, whether the existing posts today available or any other post likely to create. However the respondents are directed not to reject the application of the petitioner on the ground that the petitioner is age barred. due to pendency of petition of this Court.

(iv) The respondents will pass the order within three months from the date of the representation which they received from the petitioner and they will pass a short but speaking order in this behalf.

13. With the aforesaid observations and directions, the petition is partly allowed with no order as to costs. Rule is made absolute to the aforesaid extent.

(K.M. Mehta, J.)

syed/